IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3144 OF 2004

1.Jog Engineering Limited
A Company incorporated and
Registered under the provisions
of the Companies Act, 1956, having
its Registered office at
Jog Centre, Mumbai-Pune Road
Wakdewadi, Pune-411 003.

2.Mr.Madhav Vishnu Jog
Residing at 1002/28
New Sadashiv Peth, Rajendranagar
Pune 411 030. ..Petitioners

Vs.

The State of Maharashtra
through the Office of the
Executive Engineer
Mumbai Road Development and
Designs, Division No.1 PWD ..Respondent

Mr.K.Munshi i/b. Wadia Gandhi & Co. for Petitioner
Mr.R.M.Sawant Govt. Pleader for Respondent

CORAM: F.I. REBELLO &
S.P. KUKDAY, JJ.
DATE: 3RD MAY, 2005.

JUDGMENT (PER F.I.REBELLO,J.)

. Rule. Heard forthwith.

. By the present Petition Petitioner has prayed to quash the orders dated 3rd July, 2004 and 30th June, 2004. These were orders passed by the Committee of Secretaries appointed by Respondent to decide the claim of the Petitioners under clause 3.4.16 of the Contract. In terms of the contract the Petitioners were to construct a fly over at

Andheri. A P.I.L. Petition was filed before this Court challenging the construction of the said flyover. By an interim order of 28th July, 2000, the Petitioners were directed to proceed with the work and the Respondents were directed to make payment for the work done. Disputes have been between the parties as to whether the Petitioner is entitled to the amounts claimed. The Respondents have paid to the Petitioners a sum of Rs.68.22 crores plus additional 9.08 crores. In respect of the claim referred to the Committee of Secretaries the Committee has rejected the claim of the Petitioners, except to the extent of Rs.37 lakhs.

2. Relief is also sought in terms of prayer clause (b) which is to direct the Respondent to refer all disputes and differences between the parties in respect of the Andheri fly-over road. Admittedly there is no arbitral clause in the agreement between the parties.

3. At the hearing of this Petition on behalf of the Petitioner learned Counsel contends that the impugned orders were passed without complying with the principles of natural justice and fair play and disclose no reasons. The matter it is therefore submitted, should be refered back to the Committee It is also set out that considering Section 89 of

Civil Procedure Code and considering the controversy and more so as the Petitioners were directed to proceed with the work on account of the Petitions filed before this Court and had carried out the work pursuant to the order of this Court, the Respondents be directed to refer the matter to arbitration.

. On behalf of the Respondent, their learned Counsel submits, that the dispute in respect of the contract and claims under the contract is purely a civil dispute. The Committee of Secretaries decided on the claim of the Petitioners in terms of the contract. If the Petitioner is dissatisfied with the decision of the Committee it is open to him to take such remedy in law which Petitioners are entitled to. It is further submitted that there being no agreement for arbitration between the parties this Court will not issue a Writ to direct the Respondents to go to Arbitration. Section 89 of the Civil Procedure Code it is contended cannot be invoked considering the reliefs prayed. The contract between the parties does not provide for arbitration. There is therefore no question of directing the Respondent to proceed to arbitration. If in a properly filed proceedings if other elements for refering the matter to arbitration arise, in terms of Section 89, then only can the Court hearing the matter in those proceedings consider the issue.

It is therefore submitted that this Court ought not to grant the reliefs as prayed for.

4. We have heard learned Counsel for the parties. The decision of the Committee of Secretaries is based on a term of contract between the parties. There is no finality to that decision. In other words it is still open to the Petitioners to claim the amounts as claimed by them in appropriate proceedings. That being the nature of the order we do not think that this is a fit case for referring the matter back to the Committee of Secretaries. The rights of the parties having not being determined this is not a fit case to exercise our extra ordinary jurisdiction.

5. In so far as relief of referring the matter to arbitration is concerned admittedly there is no clause in the agreement providing for arbitration. It is no doubt true that under Section 89 of the Civil Procedure Code, the Court before which proceedings are pending, finding that there exist elements of settlement acceptable to the parties, the Court can formulate the terms for settlement and after receiving the observations, the Court may re-formulate the terms of possible settlement and refer the matter by one of the modes as set out therein. As pointed out earlier the relief sought

before this Court was to challenge the orders of the Secretaries. No other reliefs for breach of contract or claims under the contract are sought and rightly so, as that could not have been done by way of a Wit Petition. Section 89 of Civil Procedure Code if read in its correct perceptive, by its very language contemplates a consensual approach, that is in those cases where parties agree to settle the dispute by refering the matters by one of the methods as set out in Section 89. In the absence of an agreement there is no right in the Petitioners,d to seek a direction to the Court or by way of a Writ in the nature of mandamus as prayed for in the Petition. The Court before which the matter is pending, cannot also force or impose on the Petitioners, to resolve the dispute by one of the methods. The object of the Section is to persuade the parties, to adopt one of the alternate dispute. Resolution mechanism, to resolve the dispute. Section 89 does therefore confer a power on the Court to direct parties to follow one of the methods of A.D.R. The power is to persuade.

. We are therefore, not inclined to invoke our extra ordinary jurisdiction on the facts of this case. We however, make it clear that if the Petitioners file a suit it will still be open to the Court considering the reliefs in the suit to proceed

under Section 89, after following the procedural requirements of Section 89 of Civil Procedure Code.

. Learned Counsel for the Petitioner had also relied on the judgment in the case of **Assistant Collector, Central Excise Vs. J.H.Industries AIR, 1979 Supreme Court, 1889**. In our opinion the ratio of the judgment would not be applicable to the issues in issue in the present case.

6. In the light of that Rule discharged Petition dismissed . No order as to costs.

(F.I.REBELLO,J.)

(S.P. KUKDAY,J.)